

et seq., 66-2005(c, u), 66-2008(a).

[28] TELECOMMUNICATIONS ¶323

372k323

Kansas Corporation Commission (KCC) orders implementing Kansas Telecommunications Act, determining amount to be paid incumbent telephone local exchange carriers (LEC) from Kansas Universal Service Fund (KUSF), unduly burdened basic local service consumer with local loop costs that were attributable to other services and, thus, orders were inconsistent with Federal Telecommunications Act provision requiring states to ensure that services related to universal service bore no more than reasonable share of common costs; although loop facilities provided more than merely local services, amount of support to be paid carriers from Fund was based upon allocating all loop costs to basic local service. Telecommunications Act of 1996, 47 U.S.C.A. § 254(k); K.S.A. 66-2008.

****497 *222** Syllabus by the Court

1. A petition for reconsideration under K.S.A.1996 Supp. 66-118b and K.S.A.1996 Supp. 77-529(a) of a Kansas Corporation Commission (KCC) order must be sufficiently specific to inform the KCC and other parties where mistakes of law and fact were made in the order and of the manner in which the order is claimed to be erroneous or unlawful.

2. Requiring a telecommunications carrier that provides intrastate services to contribute to the Kansas Universal Service Fund does not constitute regulation or an exercise of jurisdiction by the KCC.

3. The concept of "revenue neutrality" in K.S.A.1996 Supp. 66-2005(c) and K.S.A.1996 Supp. 66-2008(a) is inconsistent with ****498** the provisions of the Federal Telecommunications Act of 1996 and with the public policy of Kansas as expressed in K.S.A.1996 Supp. 66-2001.

4. In order to ensure that all Kansans have access to universal service at affordable rates, the KCC must be able to ***223** perform an audit or earnings review of incumbent local exchange companies to determine the cost of providing universal service and an affordable rate for universal service.

5. The size of the Kansas Universal Service Fund must be based on the concept of universal service

and the cost of providing universal service.

6. The statutory prohibition against audits in K.S.A.1996 Supp. 66-2005(u) and the concept of revenue neutrality are clearly inconsistent with the KCC's obligation under Kansas law to insure just and reasonable rates and charges for Kansas consumers.

Walker Hendrix and Allen Brady Cantrell, Topeka, consumer counsel for appellant Citizens' Utility Ratepayer Board.

Mark P. Johnson, Lisa C. Creighton, and Amy E. Bauman, of Sonnenschein Nath & Rosenthal, Kansas City, MO, for appellants Kansas City Fiber Network L.P. and Multimedia Hyperion Telecommunications.

Marc E. Elkins and Lisa J. Hansen, of Morrison & Hecker L.L.P., Kansas City, MO, for appellants CMT Partners, Topeka Cellular Telephone Company, Inc. and Airtouch Cellular of Kansas, Inc.

Eva Powers, Marianne Deagle, Susan Stanley, and Janette Corazzin, Assistant General Counsels, Kansas Corporation Commission, Topeka, for appellee.

Michael C. Cavell, William R. Drexel, and Lori A. Fink, Topeka, for intervenor Southwestern Bell Telephone Company.

Mark E. Caplinger and James M. Caplinger, of James M. Caplinger, Chartered, Topeka, and Thomas E. Gleason, Jr., of Gleason & Doty, Chartered, Ottawa, for intervenors State Independent Alliance and Independent Telecommunications Group, Columbus et al.

Before KNUDSON, P.J., and GERNON and PIERRON, JJ.

KNUDSON, Judge:

This consolidated appeal is brought by the Citizens' Utility Ratepayer Board (CURB) and various telecommunication providers from orders of the Kansas Corporation Commission (KCC) implementing the Kansas Telecommunications Act, K.S.A.1996 Supp. 66-2001 et seq. (Kansas Act).

The Kansas Act was enacted to both complement and comply with the Federal *224 Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (Federal Act).

Appellant CURB represents residential and small commercial ratepayers in this proceeding. See K.S.A. 66-1223.

Appellants Kansas City Fiber Network L.P. and Multimedia Hyperion Telecommunications are providers of private line and competitive access services in Kansas and have filed a joint brief. We will, hereafter, refer to these appellants collectively as KCFN.

Appellants CMT Partners, Topeka Cellular Telephone Company, Inc., and AirTouch Cellular of Kansas, Inc., are providers of commercial mobile radio service (cellular telephone service) and have filed a joint brief. We will, hereafter, refer to these appellants collectively as CMT.

There have been numerous intervenors in this proceeding. However, the only intervenors to file briefs are the State Independent Alliance, the Independent Telecommunications Group, Columbus et al., and Southwestern Bell Telephone Company (SWBT). SWBT is the largest local exchange carrier providing local telephone service in Kansas.

CURB's appeal is from the final orders entered by the KCC on December 27, 1996, and February 3, 1997. KCFN's and CMT's appeals are from the same orders and reach this court by transfer from Shawnee County District Court. Although initially one or more of the parties expressed concern as to this court's jurisdiction, the issue was not briefed, and we conclude this court has jurisdiction pursuant to K.S.A.1996 Supp. 66-118a(b).

****499** Multiple issues are raised on appeal, but at the heart of the controversy is whether the Kansas Act and the KCC's orders implementing that Act violate or are inconsistent with the Federal Act. We conclude the KCC's final orders are not in compliance with the Federal Act and must be set aside.

Background of Telecommunications Regulation
Our review begins from the period following the court-ordered divestiture of local operating

companies by American Telephone and Telegraph Company (AT & T) in *United States v. American Tel. *225 and Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd* 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

The following information provides a history of telephone regulation in Kansas and the opposing perspectives regarding the role of the KCC. See Moline & Drexel, *The TeleKansas Debate: Incentive Regulation or Deregulation?*, 4 Kan.J.L. & Pub. Pol'y 41 (Winter 1995).

After divestiture, SWBT came before the KCC with a rate application on January 1, 1984. Under this application, the KCC approved local rates for basic telephone service that have remained unchanged up to the present time. In 1990, an alternative regulatory plan called TeleKansas was agreed upon between the KCC and SWBT. Under that plan, the KCC abandoned historic rate-based regulation in favor of price regulation. SWBT agreed not to increase basic rates and agreed to expend an additional \$140 million to modernize its infrastructure within Kansas. TeleKansas was intended to provide SWBT with price flexibility not afforded by traditional rate-based regulation. The plan was not without skeptics, who voiced concerns that SWBT's profits would not be subject to KCC scrutiny. The KCC and SWBT agreed TeleKansas would conclude in 1995 with a review of SWBT's earnings. Interested parties and the KCC would then assess the benefits and costs of price regulation versus traditional rate- of-return regulation and reconsider the regulatory scheme that best promoted quality telecommunication service and a first-rate infrastructure in Kansas.

In 1993, SWBT wanted the KCC to agree to continue with price regulation after TeleKansas expired. The KCC was reluctant to do so without investigating SWBT's earnings. After SWBT was unable to reach agreement with the KCC, it was instrumental in persuading the Kansas Legislature in 1994 to extend TeleKansas until March 1, 1997. See K.S.A.1996 Supp. 66-1,197.

This prevented the KCC from investigating SWBT's earnings, while continuing the caps on basic local service. Additionally, this legislation required SWBT to spend an additional \$64 million on infrastructure within the state of Kansas. No rate

reductions were imposed.

***226** The 1994 legislature also adopted S.Con.Res. 1627 (L.1994, ch. 371), which directed the KCC to proceed as follows:

"Be it further resolved: That the Corporation Commission shall upon passage of this resolution open one or more generic dockets to investigate the level of competition for each regulated or flexibly regulated telecommunications service under its jurisdiction. In addition the commission should:

(a) Periodically assess the level of competitiveness of such services and emerging services with the intent of encouraging development of effective competition for telecommunications services where feasible, including the removal of existing barriers to entry;

(b) establish a classification system for telecommunications services based on the degree of competition faced by providers of the particular service;

(c) establish standards and procedures by which the rates, terms and conditions of telecommunications services are regulated in accordance with their classification as in clause (b) above;

(d) ensure that regulated services will not subsidize competitive or unregulated services;

(e) define universal service, determine the extent to which it has been achieved in every region of the state and establish appropriate policies to insure universal service in high-cost areas of the state;

****500** (f) define criteria for provision of 'basic telephone service' and the availability and provision of such service in a competitive environment;

(g) develop a procedure for ensuring the quality of telecommunications services; and

(h) define 'lifeline telephone service' and specification as to the appropriate means of funding the provision of such service."

In compliance with the above resolution, in April 1994, the KCC established docket 190,492-U, In the Matter of a General Investigation into Competition within Telecommunications Industry in the State of Kansas. Phase I of the docket dealt with the probable direction of the industry and the role of the KCC to promote competition and insure quality service and products for the consumer at affordable and reasonable costs. An order on Phase I of the docket was issued in May 1995 that determined three major features of the current regulatory

structure should be modified:

"I. Universal service mechanisms must be revised to be competitively neutral and sustainable in a more competitive environment.

"II. An alternative to traditional ratebase/rate of return regulation must be established.

***227** "III. Existing barriers to competition must be reduced or eliminated wherever a cost effective means of doing so is available."

On February 8, 1996, the Federal Act was signed into law. This historic legislation mandates that local telecommunications markets be opened to competition.

In April 1996, the KCC scheduled hearings for August 1996 on Phase II of docket 190,492-U, intended to result in specific orders regarding regulation of the industry. In late May 1996, the KCC revised its Phase II procedural orders to accommodate the recently enacted Federal Act and expanded the scope of the upcoming hearings to include issues of rate rebalancing, universal service funding, and intrastate access rate reductions.

On May 17, 1996, the Kansas Act was signed by Governor Graves. Unquestionably, the Kansas Act was a response to the winding down of TeleKansas and the enactment of the Federal Act. The legislation was intended to "ensure that consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates." K.S.A.1996 Supp. 66-2001(b).

Issues Preserved for Appeal

[1] Before turning to the particulars of this litigation, we first must consider the contention of the KCC and SWBT that we lack jurisdiction to consider some of the issues raised by CURB because its petition for reconsideration does not comply with the requirements of K.S.A.1996 Supp. 66- 118b and K.S.A.1996 Supp. 77-529(a).

CURB's petition for reconsideration of the December 27, 1996, order makes several detailed challenges to the order and then briefly lists 16 supplemental issues for rehearing and reconsideration. In its February 3, 1997, order the KCC denied reconsideration of the supplemental

issues on the basis that CURB had not stated the grounds upon which it requested reconsideration with sufficient specificity as required by K.S.A.1996 Supp. 66-118b and K.S.A.1996 Supp. 77-529(a).

K.S.A.1996 Supp. 66-118b provides that a party seeking review of a KCC order must petition for reconsideration of the order in accordance with K.S.A.1996 Supp. 77-529. A party may not rely *228 upon any ground in a court proceeding that was not "set forth" in the petition for reconsideration. Under K.S.A.1996 Supp. 77-529(a), the party must file a petition for reconsideration "stating the specific grounds upon which relief is requested."

[2][3] The degree of specificity required in a petition for reconsideration is discussed in *Peoples Natural Gas v. Kansas Corporation Commission*, 7 Kan.App.2d 519, Syl. ¶ 1, 644 P.2d 999, rev. denied 231 Kan. 801 (1982). The purpose of requiring matters to be raised in the petition for reconsideration is to **501 inform the KCC and other parties where mistakes of law and fact were made in the order. 7 Kan.App.2d at 525, 644 P.2d 999. The allegations of the grounds upon which the party considers the order to be unlawful or unreasonable must be sufficiently specific and direct to apprise the KCC and opposing parties of the actual points relied on. A general or mere allegation of unlawfulness or unreasonableness is insufficient to preserve an issue for judicial review. 7 Kan.App.2d at 526, 644 P.2d 999.

This standard was restated in *In re Application of Southwestern Bell Tel. Co.*, 9 Kan.App.2d 525, Syl. ¶ 2, 685 P.2d 304, rev. denied 236 Kan. 875 (1984). The party seeking review in the *Southwestern Bell* case was American Telephone and Telegraph Information Systems (AT & T-IS). In its application for rehearing, AT & T-IS had contended that the KCC order contravened the Supremacy Clause of the United States Constitution because the tariff ordered effected a de facto transfer of a wire asset in violation of federal judgments which required that the wire remain an asset of Southwestern Bell. The court found that it was not necessary for AT & T-IS to further elaborate on this argument and that this reference to the Supremacy Clause was sufficient to comply with the specificity requirement. 9 Kan.App.2d at 536, 685 P.2d 304. However, a separate allegation,

which simply stated that the KCC order was unlawful and contrary to an order of the Federal Communications Commission (FCC), was found to be insufficiently specific to preserve the matter for judicial review because it did not "state the manner in which" the KCC order contravened the federal order. 9 Kan.App.2d at 537, 685 P.2d 304. In considering other arguments made by AT & T-IS, the court ruled that mere references to violations of the *229 Constitution did not give adequate notice of the arguments being made and were not sufficiently specific. 9 Kan.App.2d at 537-38, 685 P.2d 304.

[4] We conclude all but one of the supplemental issues were raised with sufficient specificity to meet statutory requirements. Although perhaps not a model for clarity and detailed explanation, the issues as stated by CURB are sufficiently specific to apprise the KCC and the other parties of the arguments being made and of the manner in which the order is claimed to be erroneous or unlawful.

[5] The supplemental issue designated "n" in CURB's petition for reconsideration alleges the KCC's order "is not based on substantial competent evidence, fails to provide adequate findings and is unlawful." This does lack necessary specificity required under K.S.A.1996 Supp. 77-529(a).

[6] We would further note the supplemental issue designated "e," a claim that the KCC may not have been objective in its application of the Kansas Act, was not briefed on appeal and is accordingly deemed waived or abandoned. See *Friends University v. W.R. Grace & Co.*, 227 Kan. 559, 561, 608 P.2d 936 (1980).

[7] The determination we have made leads to a new question that must be resolved. The supplemental issues properly presented in CURB's petition were not considered on their merits by the KCC. The question arises as to whether they ought to be remanded for consideration.

Some of the claims were covered in requests for reconsideration filed by other parties and were addressed by the KCC in its order on reconsideration. The other supplemental issues either make constitutional claims or present matters requiring judicial determination. We conclude this court is the proper forum to first consider and decide those issues. See *Zarda v. State*, 250 Kan.

364, 367, 826 P.2d 1365, cert. denied 504 U.S. 973, 112 S.Ct. 2941, 119 L.Ed.2d 566 (1992).

The Federal Act

[8] The Federal Act is historic legislation intended to deregulate the telecommunications industry, open local and long distance markets to competition, and ensure universal telephone service for all citizens at affordable rates. CURB, KCFN, and CMT contend the Kansas Act and the subsequent actions taken by the KCC violate *230 the Federal Act. It is, therefore, necessary that we consider certain key provisions of the Federal Act. We will **502 then review the Kansas Act and the orders entered by the KCC.

Section 253 of the Federal Act prohibits a state by statute or regulation from prohibiting or unreasonably impeding the ability of any telecommunications entity from providing interstate or intrastate service. 110 Stat. 70.

We note the concept of universal service is crucial in the calculus of deregulation. As the nation moves from monopolistic regulation to market competition, the quality of telecommunication service to the consumer must be preserved at an affordable cost.

Section 254(a) provides that a Federal-State Joint Board on Universal Service is to recommend to the FCC the definition of services to be supported by federal universal support mechanisms. 110 Stat. 71.

Section 254(b) and (c) read as follows:

"(b) **UNIVERSAL SERVICE PRINCIPLES.** The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) **QUALITY AND RATES.** Quality services should be available at just, reasonable, and affordable rates.

(2) **ACCESS TO ADVANCED SERVICES.** Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) **ACCESS IN RURAL AND HIGH COST AREAS.** Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and

advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) **EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS.**

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) **SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS.** There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) **ACCESS TO ADVANCED TELECOMMUNICATIONS SERVICES FOR SCHOOLS, HEALTH CARE, AND LIBRARIES.** Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

*231 (7) **ADDITIONAL PRINCIPLES.** Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

"(c) **DEFINITION.**

(1) **IN GENERAL.**--Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity." 110 Stat. 71-72.

Section 254(f) provides that the obligation and duty

of the states shall be as follows:

"A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable **503 and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." 110 Stat. 73.

Section 254(i) explicitly mandates that "[t]he Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable." 110 Stat. 75.

Section 254(k) prohibits telecommunications carriers from using services that are not competitive (for example, local exchange basic service) to subsidize services that are subject to competition. It also requires states to establish "any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a *232 reasonable share of the joint and common costs of facilities used to provide those services." 110 Stat. 75.

The Kansas Act

Public policy is set forth in K.S.A.1996 Supp. 66-2001, which reads:

"It is hereby declared to be the public policy of this state to:

- (a) Ensure that every Kansan will have access to a first class telecommunications infrastructure that provides excellent services at an affordable price;
- (b) ensure that consumers throughout the state realize the benefits of competition through increased services and improved telecommunications facilities and infrastructure at reduced rates;
- (c) promote consumer access to a full range of telecommunications services, including advanced telecommunications services that are comparable in

urban and rural areas throughout the state;

- (d) advance the development of a statewide telecommunications infrastructure that is capable of supporting applications, such as public safety, telemedicine, services for persons with special needs, distance learning, public library services, access to internet providers and others; and
- (e) protect consumers of telecommunications services from fraudulent business practices and practices that are inconsistent with the public interest, convenience and necessity."

The duties of the KCC stated in the Act include:

"(a) Adopt a definition of 'universal service' and 'enhanced universal service,' pursuant to subsections (p) and (q) of K.S.A.1996 Supp. 66-1,187;

...

"(c) on or before July 1, 1996, the commission shall initiate a proceeding to adopt guidelines to ensure that all telecommunications carriers and local exchange carriers preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers;

...

"(h) on or before January 1, 1997, establish the Kansas universal service fund pursuant to K.S.A.1996 Supp. 66-2008, hereinafter referred to as the KUSF, and make various determinations relating to the implementation of such fund." K.S.A.1996 Supp. 66-2002.

In K.S.A.1996 Supp. 66-2005(b), the legislature provided that each local exchange carrier (LEC) is to file a regulatory reform plan during 1997 and may elect price cap regulation or traditional rate of return regulation.

*233 An LEC is defined as "any telecommunications public utility or its successor providing switched telecommunications service within any local exchange service area, as approved by the commission on or before January 1, 1996." K.S.A.1996 Supp. 66-1,187.

K.S.A.1996 Supp. 66-2005(u) provides: "No audit, earnings review or rate case shall be performed with reference to the initial prices filed as required herein."

****504** The Kansas Act mandates that, subject to KCC approval, all LECs are to reduce intrastate access and toll charges for long distance services over a 3- year period with the objective of equalizing interstate and intrastate rates in a revenue neutral manner. In addition, the Kansas Act provides:

"The commission is authorized to rebalance local residential and business service rates to offset the intrastate access and toll charge reductions. Any remaining portion of the reduction in access and toll charges not recovered through local residential and business service rates shall be paid out from the KUSF pursuant to K.S.A.1996 Supp. 66-2008." (Emphasis added.) K.S.A.1996 Supp. 66-2005(c).

The legislature then provided for the funding of the KUSF in K.S.A.1996 Supp. 66-2008, which states, in material part:

"On or before January 1, 1997, the commission shall establish the Kansas universal service fund, hereinafter referred to as the KUSF.

"(a) The initial amount of the KUSF shall be comprised of local exchange carrier revenues lost as a result of rate rebalancing pursuant to subsection (c) of K.S.A.1996 Supp. 66-2005 and subsection (a) of K.S.A.1996 Supp. 66- 2007. Such revenues shall be recovered on a revenue neutral basis. The revenue neutral calculation shall be based on the volumes and revenues for the 12 months prior to September 30, 1996, adjusted for any rate changes.

"(b) The commission shall require every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services to contribute to the KUSF on an equitable and nondiscriminatory basis. Any telecommunications carrier, telecommunications public utility or wireless telecommunications service provider which contributes to the KUSF may collect from customers an amount equal to such carrier's, utility's or provider's contribution." (Emphasis added.)

Only LECs that provided switched local exchange services in the state prior to January 1, 1996, are to serve as the carrier of last resort within their exchanges and shall be eligible to receive KUSF funding. K.S.A.1996 Supp. 66- 2009.

***234** The KCC's Final Orders

The KCC issued its final order on December 27, 1996, and its order denying reconsideration on February 3, 1997. Highly summarized, the orders provide, in material part:

1. Intrastate toll and access rates for long distance service will be reduced by \$111.6 million over a 3-year period with the objective of equalizing interstate and intrastate rates in a "revenue neutral, specific and predictable manner."

2. The initial amount of the KUSF shall offset revenues lost by the LECs as a result of the reduction in long distance rates.

3. Every telecommunications carrier, telecommunications public utility, and wireless telecommunications service provider shall contribute to the KUSF based upon the carrier's share of total intrastate retail revenues.

4. "Rate rebalancing" under the Kansas Act is irrelevant since the KCC has opted to offset the rate reductions by assessments rather than rate increases.

5. Payments to and distributions from the KUSF to the LECs may be offset to avoid unnecessary fund transfers.

6. Rates for pay phone calls shall be increased to \$.35, and the free call allowances for directory assistance are eliminated.

Analysis

(a) KCC jurisdiction of wireless providers

[9] CMT contends the KCC has illegally exercised jurisdiction over it in violation of K.S.A. 66-1,143(b), which provides: "[N]o radio common carrier shall be subject to the jurisdiction, regulation, supervision and control of the state corporation commission." CMT argues that K.S.A.1996 Supp. 66- 2008(b), which requires wireless providers to contribute to the KUSF, impermissibly confers jurisdiction.

****505** [10] Section 254(f) of the Federal Act gives states the authority to require every telecommunications carrier that provides intrastate services to contribute to a state universal service program. 110 Stat. 73. Requiring CMT to make an equitable contribution to the KUSF is distinguishable from its regulation by the KCC. The federal district court of Kansas has concluded that this provision

does *235 not conflict with 47 U.S.C. § 332(c)(3)(A) (1994). *Mountain Solutions, Inc. v. State Corporation Commission of the State of Kansas*, 966 F.Supp. 1043 (D.Kan.1997). In its ruling, the federal court stated that the KUSF contribution imposed by the KCC was not a regulation of rates or market entry, but was simply an additional cost of doing business. Slip op. at 10-11.

We agree with the reasoning in *Mountain Solutions*. The KUSF contribution cannot be characterized as an exercise of jurisdiction contrary to K.S.A. 66-1,143(b).

(b) The constitutional issues of vagueness and improper delegation of legislative authority

CURB maintains that the concept of "revenue neutrality" as used in K.S.A.1996 Supp. 66-2005(c) and K.S.A.1996 Supp. 66-2008(a) is unconstitutionally vague. CMT also claims the legislature's use of the terms "revenue neutral" and "equitable and nondiscriminatory" in 66-2008 without definition or standards constitutes an improper delegation of power to the KCC. CMT further claims that the legislature has improperly delegated its taxing authority to the KCC.

[11][12] Interpretation of the Kansas Act is a question of law. The constitutionality of a statute is presumed, and all doubts must be resolved in favor of its validity. *Guardian Title Co. v. Bell*, 248 Kan. 146, 149, 805 P.2d 33 (1991). The statute in *Guardian Title* applied only to title insurers and agents. The Supreme Court noted that it did not apply to the average citizen, but to a heavily regulated industry with specialized knowledge of the industry and its terms. 248 Kan. at 150, 152, 805 P.2d 33.

Likewise, the challenged portions of the Kansas Act do not proscribe the conduct of individual citizens or regulate the public at large. The language is directed at the KCC and its implementation of statutory mandates in the telecommunications area. The statute applies to a highly specialized, closely regulated industry.

[13] CURB contends that "revenue neutrality" has no commonly accepted meaning and that the term is so vague and indefinite that the parties use it to

support contradictory positions. We do not *236 agree. The fact that the parties may have different opinions of what the phrase requires does not mean the statute is unconstitutional. Cf. *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 244-45, 834 P.2d 368 (1992).

[14][15] CMT argues that the KUSF contribution assessed on its intrastate revenues is a tax and there is no constitutional authorization for the legislature to delegate its taxing authority to the KCC. A "tax" is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 427, 845 P.2d 57 (1993). The KUSF is not for the benefit of the general public. The monies from the KUSF are to be distributed only to certain qualifying members of the telecommunications industry. K.S.A.1996 Supp. 66-2008(c). We conclude the KUSF assessment is not a tax.

[16] CMT also argues that "revenue neutral" and "equitable and nondiscriminatory" are not defined in the Kansas Act, are vague, and are inadequate standards for the KCC to follow. CMT further argues that the legislature has given the KCC insufficient guidelines for rate rebalancing and for funding the KUSF and that there are inadequate standards to control the actions of the KCC.

[17][18][19][20] A statute delegating legislative authority must fix reasonable and definite standards to establish the manner and exercise of the power delegated. The legislature may, however, enact statutes in broad outline and authorize an administrative agency to fill in the details. In testing a statute for adequacy of standards, the character of the administrative**506 agency is important. What is a sufficient standard varies somewhat according to the complexity of the areas sought to be regulated. Standards may also be inferred from the statutory purpose. The trend is to require less detailed standards and guidance to administrative agencies in order to facilitate the administration of laws in areas of complex social and economic problems. Great leeway should be afforded the legislature in setting such standards. See *State v. Ponce*, 258 Kan. 708, 712-13, 907 P.2d 876 (1995); *Guardian Title*, 248 Kan. at 154, 805 P.2d 33.

Matters concerning public utilities have been

recognized as being highly complex, and the KCC is recognized to have vast expertise *237 and discretion in regulating utilities. *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 495, 720 P.2d 1063 (1986).

[21] We agree with the KCC and SWBT that the term "revenue neutral" is commonly used in the regulatory arena and has a recognized meaning. Technical terms and phrases, and other words and phrases in a statute that have acquired a peculiar and appropriate meaning, are construed according to those meanings. *Boatright*, 251 Kan. at 245, 834 P.2d 368. The words "equitable and nondiscriminatory" have an understandable meaning that gives adequate direction to the KCC. It is within the expertise of the KCC to apply those standards in the decision-making process. No unlawful delegation of legislative authority has been shown.

(c) The concept of revenue neutrality and the prohibition against audits

[22] We believe there are two basic, fatal flaws in the KCC order centering on the \$111.6 million access reduction and the establishment of the KUSF that arise out of the concept of revenue neutrality in K.S.A.1996 Supp. 66-2008(a) and K.S.A.1996 Supp. 66-2005(c) and the prohibition against audits and earnings review in K.S.A.1996 Supp. 66-2005(u).

[23] The revenue neutral concept is foreign to the Federal Act and was obviously intended by the Kansas Legislature to protect revenues by incumbent LECs facing a \$111.6 million loss of earnings as a result of reductions in long distance rates and toll charges. Additionally, the legislature authorized the KCC to rebalance local residential and business service rates to offset the \$111.6 million reduction but, in any event, there was to be no audit, earnings review, or rate case with reference to an LEC's initial prices filed pursuant to K.S.A.1996 Supp. 66-2005(b). This legislation is inconsistent with the provisions of the Federal Act, specifically §§ 254(b)(4), (b)(5), (f), and (i), and prevented the KCC from performing its regulatory responsibilities in general and insuring compliance by carriers with § 254(k) of the Federal Act.

[24][25] As we have already observed, the purpose

of the KUSF is to ensure that all Kansans have access to universal service at affordable*238 rates. It is impossible for the KCC to determine an affordable rate for universal service without being able to perform an audit or earnings review of the incumbent LECs. While it is true that basic telephone rates have not increased in Kansas since 1984, the industry has seen an incredible explosion of new technology that results in substantial economies of scale with a reduction in the per line cost for basic telephone service.

[26] What is the cost of basic telephone service in Kansas? We have no answer from the record before us. What is the cost to provide universal service? We have no answer from the record before us. The funding level of \$111.6 million for the KUSF was preordained by the Kansas Legislature once the concept of revenue neutrality and the prohibition against investigation of profits was written into the Kansas Act. Modification of local telephone rates was made highly problematical. There would have been inadequate regulatory review to determine the propriety of any rate changes. This made inevitable the KCC decision to set the funding level of the KUSF in an amount equal to the intrastate access and toll reductions.

The result is a final order that fully protects incumbent LECs by shifting lost revenues from one corporate pocket to another **507 while requiring all other providers and consumers to bear the financial burden of "revenue neutral" regulation. The funding methodology also precludes meaningful review of whether LECs are using services that are not competitive to subsidize services that are subject to competition. Finally, the KCC order has created a \$111.6 million fund that bears no rational relation to the concept of universal service and its cost.

We conclude the record on appeal does not contain substantial competent evidence to support the KCC's actions regarding the KUSF as required under K.S.A. 77-621(c)(7). In addition, the orders were made without foundation in fact and are unreasonable, arbitrary, and capricious, contrary to K.S.A. 77-621(c)(8).

[27] We also note CURB's contention that to prohibit the KCC from considering costs or earnings of the incumbent LECs impermissibly conflicts with its statutory mandate as a regulatory agency. The

KCC has the obligation to ensure that telecommunications *239 rates, charges, and tolls are just and reasonable. It has the authority to investigate whether rates or schedules are in any respect unfair, unjust, unreasonable, inefficient, unjustly discriminatory, or unduly preferential. See K.S.A. 66-1,187 et seq. We agree. The statutory prohibition against audits and the concept of revenue neutrality are clearly inconsistent with the obligation of the KCC to ensure just and reasonable rates and charges for the consumers of Kansas.

(d) Compliance of KCC final orders with the Kansas Act

Because of the reasons we have concluded the KCC orders must be reversed, the various issues concerning whether its final orders are in conformity with the Kansas Act are largely rendered moot. Upon remand, the KCC must comply with the Federal Act in establishing local rates and funding of the KUSF. In this context, its order must be consistent with §§ 254(f), (i), and (k). Compliance should result in contributions to the KUSF by individual entities on an "equitable and nondiscriminatory" basis, as required under K.S.A.1996 Supp. 66-2008(b).

CMT and KCFN maintain that KUSF contributions under the KCC orders are not made on an equitable and nondiscriminatory basis. In part, their argument is that the revenue neutral requirement in the Kansas Act gives the LECs an unfair competitive advantage. Also, an equal assessment may be discriminatory or create a barrier to competition. These concerns have merit. As we have stated, without a thorough analysis of cost information, the equitable and nondiscriminatory standard of K.S.A.1996 Supp. 66-2008(b) cannot be shown to have been met. We have no doubt that the KCC, upon remand, will give these issues careful consideration.

CMT has also asserted that the KCC orders have a discriminatory impact against wireless companies. It argues that the wireless companies have developed their own infrastructure to serve customers, that their situation is unlike that of any landline provider of telecommunications services, and that it is anti-competitive to force them to subsidize the incumbent LECs. The KCC noted that the wireless companies did not provide evidence at the hearing to establish a basis for treating them differently from other

providers. *240 This is correct, but we conclude the absence of evidence was due to CMT not being given proper notice of the proceedings or a reasonable opportunity to prepare for the hearings. Here again, these concerns that have been raised by CMT have merit and, upon remand, should be given a proper airing and consideration by the KCC.

(e) The allocation of costs attributable to the local loop

[28] Another difficulty is the methodology relied upon to determine payouts from the KUSF to the LECs. Local loop cost is the cost of providing access to the telecommunications network. The loop consists of the wires that connect the customer's premises to the central office serving the customer. The same loop facilities provide all services; for example, local, interstate, and advanced services. Approximately 75% of the cost of basic residential service is the cost of the local loop. However, the amount of support to be paid LECs from the KUSF was based **508 upon allocating 100% of the loop costs to basic local service.

Section 254(k) of the Federal Act directs the states to establish safeguards and guidelines to ensure that services related to universal service "bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." 110 Stat. 75. We believe the KCC orders unduly burden the basic local service consumer with loop costs that are attributable to other services. Upon remand, the KCC should make reasonable effort to ensure that a reasonable apportionment of the costs of the local loop are made.

(f) Notice issues

For all of the foregoing reasons stated, we conclude the KCC's final orders establishing, implementing, and funding the KUSF must be set aside and this matter remanded to the KCC for further hearing and consideration in accordance with this opinion. Our opinion also requires that the KCC's decision to allow an increase in pay phone and directory assistance rates must also be set aside since that decision was part and parcel of the KUSF funding decision.

Upon remand, the KCC must disregard the concept of revenue neutrality as expressed or implied in

943 P.2d 494

(Cite as: 24 Kan.App.2d 222, *241, 943 P.2d 494, **508)

K.S.A.1996 Supp. 66-2005(c) *241 and K.S.A.1996 Supp. 66-2008, as it is wholly inconsistent with the Federal Act and the public policy of Kansas as expressed in K.S.A.1996 Supp. 66-2001. Likewise, the KCC must disregard the provision of K.S.A.1996 Supp. 66-2005(u) that prohibits any audit or earning review. The KCC cannot meet its

general regulatory responsibilities or those mandated under the Federal Act without a complete and thorough review of the earnings of the LECs.

Reversed and remanded.

END OF DOCUMENT

CITIZENS' UTILITY RATEPAYER BOARD,
Appellant,

v.

The STATE CORPORATION COMMISSION
OF the STATE OF KANSAS, Appellee.
MULTIMEDIA HYPERION
TELECOMMUNICATIONS and Kansas City
Fiber Network L.P.,
Appellants,

v.

The STATE CORPORATION COMMISSION
OF the STATE OF KANSAS, Appellee.
CMT PARTNERS, Topeka Cellular Telephone
Company, Inc., and Airtouch Cellular of
Kansas, Inc., Appellants,

v.

The STATE CORPORATION COMMISSION
OF the STATE OF KANSAS, Appellee.

Nos. 78548, 78823, 78834, 78822.

Supreme Court of Kansas.

March 13, 1998.

Citizens' Utility Ratepayer Board (CURB) appealed Kansas Corporation Commission (KCC) orders implementing Kansas Telecommunications Act. Telecommunications service providers appealed KCC orders to the District Court, Shawnee County. Following transfer and consolidation of appeals, the Court of Appeals, Knudson, J., 24 Kan.App.2d 222, 943 P.2d 494, reversed and remanded. Incumbent local exchange carriers (LEC) appealed. The Supreme Court, Abbott, J., held that: (1) Revenue neutral concept of Kansas Telecommunications Act is not prohibited by or contrary to Federal Telecommunications Act; (2) Kansas Act does not prevent KCC from making appropriate adjustments to rates and performing a cost study or from conducting an audit or earnings review of incumbent telephone LECs to determine cost of providing universal service and affordable rates for universal service; (3) Kansas Act does not conflict with KCC's statutory duty to regulate and ensure just and reasonable rates and charges to consumers; (4) radio common carrier waived its right to reopen technical hearings; (5) KCC could set Kansas Universal Service Fund (KUSF) surcharge for provider to pay to cover same cost of supporting the wire line infrastructure, without constituting an exercise of

jurisdiction or control over provider and violating Act section prohibiting the KCC from exercising any jurisdiction, regulation, supervision, or control over radio common carriers; (6) Act section authorizing KCC to require contributions to the KUSF was not an unconstitutional delegation of legislative power to an administrative agency; (7) standards set out in Telecommunications Act for KCC in assessing KUSF surcharge were sufficiently reasonable; (8) Act section providing that KCC is authorized to rebalance local residential and business service rates to offset the intrastate access and toll charge reductions does not require the KCC to increase local service rates; and (9) KCC orders relating to setoff procedures did not improperly exempt LECs from contributing to KUSF.

Court of Appeals affirmed in part and reversed in part.

[1] CONSTITUTIONAL LAW \S 70.3(9.1)
92k70.3(9.1)

Legislature determines utility policy, and so long as a legislative act does not contravene federal or state law, courts should not interfere with it, even though the action taken appears, to the court, to be unsound and not the best way, or even a good way, to carry out the stated purpose of the act.

[2] STATES \S 18.81
360k18.81

Revenue neutral concept of Kansas Telecommunications Act section governing reduction of intrastate access rates by incumbent telephone local exchange carriers (LEC) and reimbursement of resulting revenue loss by other telecommunications service providers is not prohibited by or contrary to the Federal Telecommunications Act. Telecommunications Act of 1996, \S 1 et seq., 110 Stat. 56; K.S.A. 66-2005(c), 66-2008(a).

[2] TELECOMMUNICATIONS \S 301
372k301

Revenue neutral concept of Kansas Telecommunications Act section governing reduction of intrastate access rates by incumbent telephone local exchange carriers (LEC) and reimbursement of resulting revenue loss by other telecommunications service providers is not prohibited by or contrary to the Federal

Telecommunications Act. Telecommunications Act of 1996, § 1 et seq., 110 Stat. 56; K.S.A. 66-2005(c), 66-2008(a).

[3] TELECOMMUNICATIONS ⇨323

372k323

Kansas Telecommunications Act does not prevent Kansas Corporation Commission (KCC) from making appropriate adjustments to rates and performing a cost study or from conducting an audit or earnings review of incumbent telephone local exchange carriers (LEC) to determine cost of providing universal service and affordable rates for universal service. K.S.A. 66-2005(u).

[4] TELECOMMUNICATIONS ⇨301

372k301

Kansas Telecommunications Act does not conflict with Kansas Corporation Commission's (KCC) statutory duty to regulate and ensure just and reasonable rates and charges to consumers. K.S.A. 66-1,187 et seq., 66-2001 et seq.

[5] TELECOMMUNICATIONS ⇨461.5

372k461.5

Radio common carrier waived its right to reopen technical hearings and argue new facts, despite fact that carrier may not have received proper notice prior to second phase of technical hearings, where carrier did not raise any new facts in its petitions for Kansas Corporation Commission (KCC) reconsideration that it would have argued at technical hearings had it been given proper notice.

[6] STATUTES ⇨223.1

361k223.1

Courts must construe all provisions of statutes in pari materia with a view of reconciling and bringing them into workable harmony, if reasonably possible to do so.

[7] STATUTES ⇨190

361k190

In interpreting a statute, a court must give effect to its plain and unambiguous language, without determining what the law should be.

[8] STATUTES ⇨190

361k190

When a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a

statute so as to add something not readily found in the statute.

[9] STATUTES ⇨206

361k206

In construing statutes, the legislative intention is to be determined from a general consideration of the entire act.

[10] STATUTES ⇨206

361k206

In construing statutes, effect must be given, if possible, to the entire act and every part thereof; to this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.

[11] STATUTES ⇨206

361k206

In order to ascertain the legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act, but are required to consider and construe together all parts thereof in pari materia.

[12] STATUTES ⇨206

361k206

Several provisions of an act, in pari materia, must be construed together with a view of reconciling and bringing them into workable harmony and giving effect to the entire act if it is reasonably possible to do so.

[13] TELECOMMUNICATIONS ⇨461.5

372k461.5

Given that Kansas Corporation Commission (KCC) previously set access rates properly chargeable to telecommunication providers, KCC could set Kansas Universal Service Fund (KUSF) surcharge for provider to pay, pursuant to Kansas Telecommunications Act, to cover same cost of supporting the wire line infrastructure, without constituting an exercise of jurisdiction or control over provider and violating Act section prohibiting the KCC from exercising any jurisdiction, regulation, supervision, or control over radio common carriers. K.S.A. 66-1,143(b), 66-2008(b).

[14] CONSTITUTIONAL LAW ⇨62(14)

92k62(14)

Kansas Universal Service Fund (KUSF) surcharge authorized by Telecommunications Act was not a

956 P.2d 685
(Cite as: 956 P.2d 685)

tax, and thus, Act section authorizing Kansas Corporation Commission (KCC) to require contributions to the KUSF was not an unconstitutional delegation of legislative power to an administrative agency, given that purpose of surcharge was not to raise revenue but simply to manipulate manner in which same money was paid to same parties to make an implicit subsidy explicit. K.S.A. 66-2008.

[14] TELECOMMUNICATIONS ⇨307.1

372k307.1

Kansas Universal Service Fund (KUSF) surcharge authorized by Telecommunications Act was not a tax, and thus, Act section authorizing Kansas Corporation Commission (KCC) to require contributions to the KUSF was not an unconstitutional delegation of legislative power to an administrative agency, given that purpose of surcharge was not to raise revenue but simply to manipulate manner in which same money was paid to same parties to make an implicit subsidy explicit. K.S.A. 66-2008.

[15] CONSTITUTIONAL LAW ⇨50

92k50

Legislative power is the power to make a law, as opposed to the power to enforce a law.

[16] CONSTITUTIONAL LAW ⇨60

92k60

Delegation of legislative power is improper unless specific constitutional authority allows the legislature to delegate its legislative power to a different branch of government.

[17] CONSTITUTIONAL LAW ⇨60

92k60

If constitutional authority does not authorize a delegation of legislative power, then such delegation is improper and violates the separation of powers doctrine. U.S.C.A. Const. Art. 3, § 1 et seq.

[18] ADMINISTRATIVE LAW AND PROCEDURE ⇨303.1

15Ak303.1

Administrative power is the power to administer or enforce a law, as opposed to the legislative power to make a law.

[19] CONSTITUTIONAL LAW ⇨60

92k60

Legislature does not need constitutional authority to delegate administrative power because it is not delegating a power reserved for its branch of government, such as the power to make a law; thus, the separation of powers doctrine does not prevent a delegation of administrative power, even without constitutional authority for the delegation. U.S.C.A. Const. Art. 3, § 1 et seq.

[20] CONSTITUTIONAL LAW ⇨60

92k60

Difference between delegated legislative and administrative powers depends upon amount of specific standards included within delegation; if legislature has included specific standards in a delegation, then it has already enacted the law and it is simply delegating administrative power to enforce law, based on standards included in delegation, but if legislature has not included specific standards within a delegation, then legislature has delegated legislative power to make the law and accompanying standards, and such delegation is improper without constitutional authority. U.S.C.A. Const. Art. 3, § 1 et seq.

[21] TAXATION ⇨4

371k4

Power to tax is a legislative power.

[22] TAXATION ⇨1

371k1

Primary purpose of a tax is to raise money, not regulation; such a demand is only a tax if it is a forced contribution to raise revenue for the maintenance of government services offered to the general public.

[23] TAXATION ⇨1

371k1

"Tax" is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public.

See publication Words and Phrases for other judicial constructions and definitions.

[24] CONSTITUTIONAL LAW ⇨50

92k50

Strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power and where legislative, executive, and judicial powers are often blended

together in the same administrative agency. U.S.C.A. Const. Art. 3, § 1 et seq.

[25] CONSTITUTIONAL LAW ⇨62(2)

92k62(2)

What separation of powers doctrine requires is that a statute express the law in general terms and delegate the power to apply it to an executive agency under standards provided by the legislature. U.S.C.A. Const. Art. 3, § 1 et seq.

[26] CONSTITUTIONAL LAW ⇨62(1)

92k62(1)

Where flexibility in fashioning administrative regulations to carry out statutory purpose is desirable in light of complexities in the area sought to be regulated, the legislature may enact statutes in a broad outline and authorize the administrative agency to fill in the details.

[27] CONSTITUTIONAL LAW ⇨62(14)

92k62(14)

Standards set out in Telecommunications Act for Kansas Corporation Commission (KCC) in assessing Kansas Universal Service Fund (KUSF) surcharge were sufficiently reasonable and definite; standards identified which telecommunications rates should be reduced, when they should be reduced, and over what time period, identified which rates could be increased, how much rates could be increased by, initial balance of KUSF, who had to pay into the KUSF, how payments should be made, who qualified for KUSF distribution, how much distribution an entity should receive, if KUSF surcharge could be passed along to customers, when and how supplemental funding occurred, and KUSF administrator's duties. K.S.A. 66-2001 et seq., 66-2008.

[27] TELECOMMUNICATIONS ⇨301

372k301

Standards set out in Telecommunications Act for Kansas Corporation Commission (KCC) in assessing Kansas Universal Service Fund (KUSF) surcharge were sufficiently reasonable and definite; standards identified which telecommunications rates should be reduced, when they should be reduced, and over what time period, identified which rates could be increased, how much rates could be increased by, initial balance of KUSF, who had to pay into the KUSF, how payments should be made, who qualified for KUSF distribution, how much

distribution an entity should receive, if KUSF surcharge could be passed along to customers, when and how supplemental funding occurred, and KUSF administrator's duties. K.S.A. 66-2001 et seq., 66-2008.

[28] CONSTITUTIONAL LAW ⇨62(14)

92k62(14)

Fact that Telecommunications Act standards for Kansas Corporation Commission (KCC) left some discretion to the KCC to determine exactly how a Kansas Universal Service Fund (KUSF) assessment and payout should occur did not result in an improper delegation of legislative power, as opposed to administrative power. K.S.A. 66-2008.

[28] TELECOMMUNICATIONS ⇨301

372k301

Fact that Telecommunications Act standards for Kansas Corporation Commission (KCC) left some discretion to the KCC to determine exactly how a Kansas Universal Service Fund (KUSF) assessment and payout should occur did not result in an improper delegation of legislative power, as opposed to administrative power. K.S.A. 66-2008.

[29] CONSTITUTIONAL LAW ⇨62(2)

92k62(2)

Statute delegating legislative authority must fix reasonable and definite standards to establish the manner and exercise of the power delegated; however, the legislature may enact statutes in broad outline and authorize an administrative agency to fill in the details.

[30] CONSTITUTIONAL LAW ⇨62(2)

92k62(2)

In testing a statute for adequacy of standards for an administrative agency, the character of the administrative agency is important; what is a sufficient standard varies somewhat according to the complexity of the areas sought to be regulated.

[31] CONSTITUTIONAL LAW ⇨62(2)

92k62(2)

Trend in delegating administrative power to administrative agency is to require less detailed standards and guidance to administrative agencies in order to facilitate the administration of laws in areas of complex social and economic problems; great leeway should be afforded the legislature in setting such standards.

[32] PUBLIC UTILITIES ⇌194

317Ak194

When issues of law are raised by a petition for judicial review of decision of Kansas Corporation Commission (KCC), the reviewing court is required to engage in de novo review and may substitute its judgment for that of the KCC.

[33] TELECOMMUNICATIONS ⇌14

372k14

Kansas Corporation Commission's (KCC) interpretation of a statute that it is charged to interpret and enforce, using its expertise, is entitled to a great deal of judicial deference by the courts.

[34] TELECOMMUNICATIONS ⇌14

372k14

Kansas Corporation Commission's (KCC) determination of a question of law is not binding on the reviewing court.

[35] PUBLIC UTILITIES ⇌194

317Ak194

Whether Kansas Corporation Commission (KCC) has erroneously interpreted or applied the law in an unconstitutional manner is a question of law over which an appellate court's review is unlimited.

[36] PUBLIC UTILITIES ⇌194

317Ak194

If the Kansas Corporation Commission (KCC) is mistaken as to a question of law, the reviewing court has an obligation to cure the KCC's action.

[37] TELECOMMUNICATIONS ⇌307.1

372k307.1

Telecommunications Act section providing that Kansas Corporation Commission (KCC) is authorized to rebalance local residential and business service rates to offset the intrastate access and toll charge reductions does not require the KCC to increase local service rates; it only authorizes such increases should the KCC choose to recoup lost revenues, due to the access rate reduction, in this manner. K.S.A. 66-2005(c).

[38] TELECOMMUNICATIONS ⇌307.1

372k307.1

All lost revenues, due to telecommunications access rate reduction, were required to be paid out of Kansas Universal Service Fund (KUSF), where none of revenues lost, due to access rate reduction, were

recovered from rate rebalancing or increasing local rates because Kansas Corporation Commission (KCC) chose not to recoup lost revenues in this manner, as it had discretion to do. K.S.A. 66-2005(c).

[39] TELECOMMUNICATIONS ⇌323

372k323

Kansas Corporation Commission (KCC) orders relating to setoff procedures did not improperly exempt local exchange carriers (LEC) from contributing to Kansas Universal Service Fund (KUSF) in violation of Telecommunications Act section which requires contributions to the KUSF be made on equitable and nondiscriminatory basis; local exchange carriers (LEC) were allowed to setoff their KUSF contributions with a KUSF distribution to which they were entitled, and this was simply an accounting mechanism to prevent the LEC from paying its contribution to the KUSF and the KUSF then paying the money right back to the LEC as a KUSF distribution.. K.S.A. 66-2008(b).

***689** Syllabus by the Court

1. The legislature determines utility policy, and so long as a legislative act does not contravene federal or state law, courts should not interfere with it, even though the action taken appears, to the court, to be unsound and not the best way, or even a good way, to carry out the stated purpose of the act.

2. Courts must construe all provisions of statutes in *pari materia* with a view of reconciling and bringing them into workable harmony, if reasonably possible to do so.

3. In interpreting a statute, a court must give effect to its plain and unambiguous language, without determining what the law should be.

4. In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.

5. A tax is a forced contribution to raise revenue for the maintenance of government services offered to the general public.

6. A strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power and where legislative, executive, and judicial powers are often blended together in the same administrative agency.

7. A statute should express the law in general terms and delegate the power to apply it to an executive agency under standards provided by the legislature. What is a sufficient standard must necessarily vary somewhat according to the complexity of the area sought to be regulated. Standards may be implied from the statutory purpose. The modern trend is to require less detailed standards and guidance to the administrative agencies in order to facilitate the administration of laws in areas of complex social and economic problems.

8. In a Kansas Corporation Commission (KCC) rate case, the record is examined and it is held: (1) A revenue neutral concept is not prohibited by or contrary to the Federal Telecommunications Act of 1996; (2) the Kansas Telecommunications Act of 1996 does not prevent a subsequent audit and earnings study; (3) the Kansas Act does not conflict with the KCC's statutory duty to regulate and ensure just and reasonable rates and charges to consumers; (4) by failing to include what it would have presented at the technical hearings in its motion for KCC reconsideration, CMT waived the issue of improper notice of the hearings; (5) K.S.A.1996 Supp. 66-2008(b) and K.S.A. 66-1,143(b) do not conflict; (6) K.S.A.1996 Supp. 66-2008 is a delegation of administrative power, not legislative power, to the KCC; (7) the KCC did not order and was not required to order a local service rate increase or rate rebalancing, and the initial funding amount for the Kansas Universal Service Fund (KUSF) is appropriate; and (8) the KCC orders allowing a setoff procedure are not inequitable or discriminatory.

Walker Hendrix, Consumer Counsel, Topeka, argued the cause, and Allen Brady Cantrell, Consumer Counsel, Topeka, was with him on the briefs for appellant Citizens' Utility Ratepayer Board.

Mark P. Johnson, of Sonnenschein Nath & Rosenthal, Kansas City, MO, argued the cause, and Tamara Seyler-James, Lisa C. *690 Creighton, and

Amy E. Bauman, of the same firm, were with him on the briefs for appellants Kansas City Fiber Network L.P. and Multimedia Hyperion Telecommunications.

Marc E. Elkins and Lisa J. Hansen, of Morrison & Hecker L.L.P., Kansas City, MO, were on the briefs for appellants CMT Partners, Topeka Cellular Telephone Company, Inc., and Airtouch Cellular of Kansas, Inc.

Eva Powers, Assistant General Counsel, argued the cause, and Glenda Cafer, General Counsel, and Marianne Deagle, Susan Stanley, and Janette Corazzin, Assistant General Counsels, Topeka, were with her on the briefs for appellee Kansas Corporation Commission.

Robert A. Fox, of Foulston & Siefkin, L.L.P., Topeka, argued the cause, and Dana Bradbury Green, of the same firm, and Michael J. Jewell, Austin, TX, were with him on the briefs for intervenor AT & T Communications of the Southwest, Inc.

William R. Drexel, Topeka, argued the cause, and Michael C. Cavell and Lori A. Fink, Topeka, and Frank A. Caro, of Polsinelli, White, Vardeman & Shalton, Overland Park, were with him on the brief for intervenor Southwestern Bell Telephone Company.

Stephen D. Minnis, Overland Park, argued the cause, and Martha Jenkins, Kansas City, MO, was with him on the briefs for intervenor United Telephone Companies of Kansas d/b/a Sprint Communications.

Mark E. Caplinger and James M. Caplinger, of James M. Caplinger, Chartered, Topeka, and Thomas E. Gleason, Jr., of Gleason & Doty, Chartered, Ottawa, were on the briefs for intervenors State Independent Alliance and Independent Telecommunications Group, Columbus, et al.

ABBOTT, Justice.

This case is before the Supreme Court on petitions for review by various parties and intervenors, viz., appellee Kansas Corporation Commission (KCC), intervenor Southwestern Bell Telephone, intervenor

Sprint Communications/United Telephone Companies, intervenor State Independent Alliance, intervenor Independent Telecommunications Group, Columbus, et al., and appellants/cross-petitioners for review CMT Partners, et al.

SWBT and Sprint/United are incumbent local exchange carriers (LECs) in Kansas. State Independent Alliance and Independent Telecommunications Group, Columbus, et al., are special interest groups representing rural independent LECs (ILECs). The rural ILECs represented by these two groups provide local exchange services throughout Kansas. CMT Partners, et al., are business entities and radio common carriers providing commercial mobile radio service in Kansas (wireless service providers). Multimedia Hyperion Telecommunications and Kansas City Fiber Network L.P. are providers of private line and competitive access services in Kansas.

In general, the Court of Appeals in 24 Kan.App.2d 222, 943 P.2d 494 (1997), invalidated certain portions of the Kansas Telecommunications Act of 1996 (Kansas Act) (L.1996, ch. 268, § 1 through § 12, codified at K.S.A.1996 Supp. 66-2001 et seq.) and the KCC orders implementing that Act on grounds they were inconsistent with the Federal Telecommunications Act of 1996 (Federal Act), Pub.L. No. 104-104, 110 Stat. 56 (1996), and also inconsistent with certain provisions of Kansas law. The Court of Appeals also held K.S.A. 66-1,143(b) does not prevent the KCC from requiring wireless service providers to contribute to the Kansas Universal Service Fund (KUSF); wireless service providers were not given proper notice of the proceedings and a reasonable opportunity to prepare for the hearings before the KCC; and the legislature's authorization to the KCC to determine the appropriate level of funding contribution and regulation of the KUSF pursuant to K.S.A.1996 Supp. 66-2008 is not an unconstitutional delegation of legislative power to an administrative agency.

The KCC, SWBT, and Sprint are seeking to uphold the KCC orders and the provisions of the Kansas Act that the Court of Appeals found offensive. Citizens' Utility Ratepayer Board (CURB), Multimedia Hyperion/KCFN, and AT & T Communications of the Southwest, Inc., (AT & T) are seeking to *691 have the provisions in question

invalidated. CMT Partners, et al., also seek to invalidate these provisions. They believe they should not be required to contribute to the KUSF based on the fact that, as wireless service providers, they are not subject to KCC oversight and control. The real interest of State Independent Alliance and Independent Telecommunications Group, Columbus, et al., seems to be that, however this matter ends up, they do not want to lose any revenues in the process.

This court ordered a prehearing conference conducted by Chief Justice, Retired, David Prager. The only issues properly before this court for decision at the present time are the eight issues set out in the prehearing conference order. Sections 253 and 254(e) of the Federal Act are not at issue, nor are KUSF distributions.

At the outset, we make three observations. First, although the underlying KCC regulations may ultimately increase competition, the underlying legislation appears to be largely a cost shift between consumers, with no actual reduction in the total cost of service. Second, **the ultimate issues in this case will, for the most part, be determined by the federal courts under federal law, which will render most of this opinion as a suggestion to the federal courts for such consideration as they choose to give it, if any.** Third, the appeal seems, in most part, to be premature. As we view the briefs, no actual harm is alleged, only potential or the possibility of harm. However, we do have jurisdiction and thus will decide the case.

BACKGROUND

By way of background, the KCC scheduled a Competition Docket in 1994. In Phase I of the KCC's Competition Docket, the KCC conducted hearings and established task forces regarding competition in the telecommunications industry in Kansas. Several telecommunications providers participated in Phase I, but appellant CMT, a wireless service provider, did not participate in any of these activities, nor did any other wireless service provider. On April 4, 1996, after the Federal Telecommunications Act was passed, the KCC issued its Phase II Procedural Order in the Competition Docket. On May 17, 1996, the Governor signed the Kansas Telecommunications Act. Within this Act, K.S.A.1996 Supp. 66-2008(b)

authorized the KCC to assess all telecommunications carriers, public utilities, and wireless service providers a surcharge for support of the KUSF.

Based on this statute, in May 1996, the KCC issued an order modifying the Phase II Procedural Schedule by including wireless issues. This order identified rate rebalancing, intrastate access rate reductions, and an assessment on toll minutes of use as issues to be addressed in the Phase II technical hearings, which were to be held August 12-15, 1996. This order also established a schedule for filing direct testimony on unresolved wireless issues. Finally, this order indicated that the KCC intended to exercise jurisdiction over wireless service providers in regard to universal service. The affected parties had 70 days to retain experts and prepare direct testimony for the technical hearing and 45 days to review the KCC staff testimony and prepare cross-examination for the technical hearing. On June 17, 1996, the KCC also issued an order scheduling four public hearings on the issue of rate rebalancing.

The KCC served these orders on the telecommunications service providers who had participated in Phase I of the KCC's Competition Docket. Wireless service providers had not participated in Phase I and were not served orders notifying them of the Phase II hearings, even though the KCC considered exercising jurisdiction over wireless service providers in Phase II of the Competition Docket. The KCC directed all telecommunications companies, with notice of the hearings, to notify their customers of the hearings through a billing insert in the July 1996 billing cycle and through a newspaper advertisement in newspapers with general circulation in the counties where the telecommunications companies provided service. The KCC ordered the telecommunications companies to file affidavits of compliance with these notice requirements.

On August 12-15, 1996, the KCC conducted technical hearings pursuant to its April 4, *692 1996, Phase II Procedural Order. At the beginning of the hearings, CMT filed a petition to intervene in these proceedings, which the KCC granted. Upon intervention, CMT objected to the hearing, claiming that it had not received sufficient notice of the hearings. Due to this lack of notice, CMT claimed it had not had adequate time to prepare and file direct testimony or cross-examine witnesses who had

already filed direct testimony. The KCC found that the notice of the proceeding was adequate and overruled CMT's objection.

Based on the facts presented at the Phase II technical hearings, the KCC issued an order on December 27, 1996, which provided for funding of the KUSF.

In general, the KCC final orders require: (1) intrastate toll and access rates for long distance service to be reduced by \$111.6 million over 3 years with the objective of equalizing interstate and intrastate rates in a revenue neutral, specific, and predictable manner (i.e., toll and access charges paid by long distance companies to LECs are to be reduced by that amount within that time frame); (2) the initial amount of the KUSF to offset revenues lost by local exchange carriers as a result of the reduction in intrastate toll and access long distance rates (i.e., the initial amount of the KUSF is to equal the amount of local exchange carriers' loss of revenue from reduced toll and access rates); (3) contributions to the KUSF to be based on each carrier's total intrastate retail revenues; (4) rates for pay phone calls to be increased to 35 cents and the free call allowances for directory assistance to be eliminated; and (5) wireless service providers to contribute to the KUSF.

CURB and various telecommunications providers appealed to the Court of Appeals from the KCC final orders, contending the Kansas Act and the KCC orders pursuant to that Act violated the Federal Act. The Court of Appeals stated that the key issue in this appeal is whether the Kansas Act and the KCC orders implementing that Act violate or are inconsistent with the Federal Act. The Court of Appeals held that the KCC orders do not comply with the Federal Act and must be set aside. The Court of Appeals also implicitly invalidated portions of the Kansas Act pertaining to the concept of revenue neutrality, K.S.A.1996 Supp. 66-2005(c) and 66-2008(a), and prohibiting audits and earnings reviews, K.S.A.1996 Supp. 66-2005(u), by directing the KCC to disregard those provisions upon remand.

THE FEDERAL ACT

The Federal Act became law on February 8, 1996. The Federal Act was intended to deregulate the telecommunications industry, open local and long

distance telecommunications markets to competition, and ensure universal telephone service for all citizens at affordable rates.

Section 254(b) of the Federal Act provides in relevant part as follows:

"(b) **UNIVERSAL SERVICE PRINCIPLES.** The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

....
 "(4) **EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS.** All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

"(5) **SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS.** There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 110 Stat. 71-72.

Section 254(f) of the Federal Act provides:

"(f) A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to *693 the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms." 110 Stat. 73.

Section 254(i) of the Federal Act provides:

"(i) **CONSUMER PROTECTION.** The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable." 110 Stat. 75.

Section 254(k) of the Federal Act provides:

"(k) **SUBSIDY OF COMPETITIVE SERVICES PROHIBITED.** A telecommunications carrier may not use services that are not competitive to

subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." 110 Stat. 75.

THE KANSAS ACT

K.S.A.1996 Supp. 66-2001 sets out the public policy underlying the Kansas Act.

K.S.A.1996 Supp. 66-2002(h) requires the KCC, on or before January 1, 1997, to establish the KUSF pursuant to K.S.A.1996 Supp. 66-2008 and to make various determinations relating to the implementation of the fund. The fund was established by the KCC's December 27, 1996, final orders.

K.S.A.1996 Supp. 66-2005(c) requires the reduction of intrastate access and toll charges for long distance service over a 3-year period with the objective of equalizing interstate and intrastate rates in a revenue neutral, specific, and predictable manner. In addition, that section provides that the KCC is authorized to rebalance local residential and business service rates to offset the intrastate access and toll charge reductions; further, any remaining portion of the reduction in access and toll charges not recovered through local residential and business service rates shall be paid out from the KUSF pursuant to K.S.A.1996 Supp. 66-2008. Rural telephone companies are required to reduce their intrastate switched access rates to interstate levels on March 1, 1997, and every 2 years thereafter, as long as amounts equal to such reductions are recovered from the KUSF.

K.S.A.1996 Supp. 66-2005(u) provides that "[n]o audit, earnings review or rate case shall be performed with reference to the initial prices filed" by local exchange carriers pursuant to 66-2005(b).

K.S.A.1996 Supp. 66-2008(a) provides that the initial amount of the KUSF shall be comprised of local exchange carrier revenues lost as a result of rate rebalancing and such revenues shall be recovered on a revenue neutral basis.

K.S.A.1996 Supp. 66-2008(b) provides that the KCC shall require every telecommunications carrier, telecommunications public utility, and wireless service provider that provides intrastate telecommunications services to contribute to the KUSF on an equitable and nondiscriminatory basis and that those contributors may collect from customers an amount equal to their contribution.

THE COURT OF APPEALS' OPINION

The Court of Appeals held:

1. K.S.A.1996 Supp. 66-2008(b), which requires wireless service providers to contribute to the KUSF, does not impermissibly confer jurisdiction on the KCC over wireless service providers in contravention of K.S.A. 66-1,143(b), which prohibits regulation of radio common carriers by the KCC. Requiring wireless service providers to make an equitable contribution to the KUSF is distinguishable from the regulation of wireless service providers by the KCC. 24 Kan.App.2d at 234-35, 943 P.2d 494.

2. (a) The concept of "revenue neutrality" as used in K.S.A.1996 Supp. 66- 2005(c) and 66-2008(a) is not unconstitutionally vague.

(b) The term "revenue neutral" has a recognized meaning; the words "equitable and *694 nondiscriminatory" have an understandable meaning that gives adequate direction to the KCC. No unlawful delegation of legislative authority has been shown by the legislature's use of the terms "revenue neutral" and "equitable and nondiscriminatory" in K.S.A.1996 Supp. 66-2008. 24 Kan.App.2d at 237, 943 P.2d 494.

3. The concept of revenue neutrality, K.S.A.1996 Supp. 66-2008(a) and 66- 2005(c), and the prohibition against audits and earnings review in K.S.A.1996 Supp. 66-2005(u) are inconsistent with the Federal Act, specifically §§ 254(b)(4), (b)(5), (f), and (i), and prevented the KCC from performing its regulatory responsibilities in general and ensuring compliance by carriers with § 254(k) of the Federal Act. It is impossible for the KCC to determine an affordable rate for universal service without being able to perform an audit or earnings review of the incumbent LECs. The KCC order has created a \$111.6 million fund that bears no rational relation to the concept of universal service and its

cost. The record on appeal does not contain substantial competent evidence to support the KCC's actions regarding the KUSF, and the KCC orders were made without foundation in fact and are unreasonable, arbitrary, and capricious. The statutory prohibition against audits and the concept of revenue neutrality are clearly inconsistent with the obligation of the KCC to ensure just and reasonable rates and charges for the consumers of Kansas. 24 Kan.App.2d at 237-39, 943 P.2d 494.

4. Upon remand, the KCC must comply with the Federal Act in establishing local rates and funding of the KUSF. In this context, its order must be consistent with § 254(f), (i), and (k). Compliance should result in contributions to the KUSF by individual entities on an "equitable and nondiscriminatory" basis, as required under K.S.A.1996 Supp. 66-2008(b). Without a thorough analysis of cost information, the equitable and nondiscriminatory standard of K.S.A.1996 Supp. 66-2008(b) cannot be shown to have been met. 24 Kan.App.2d at 239, 943 P.2d 494.

5. The absence of evidence before the KCC regarding whether wireless service providers should be treated differently than other providers was due to wireless service providers not being given proper notice of the proceedings or a reasonable opportunity to prepare for the hearings before the KCC. 24 Kan.App.2d at 240, 943 P.2d 494.

6. The KCC orders unduly burden the basic local service consumer with loop costs that are attributable to other services. Upon remand, the KCC should make reasonable efforts to ensure that a reasonable apportionment of the costs of the local loop is made. 24 Kan.App.2d at 240, 943 P.2d 494.

7. The KCC's final orders relating to the KUSF are set aside, and the matter is remanded to the KCC for further proceedings. The KCC's decision to allow an increase in pay phone and directory assistance rates must also be set aside since that decision was part and parcel of the KUSF funding decision. Upon remand, the KCC must disregard the concept of revenue neutrality and the prohibition against any audit or earnings review. 24 Kan.App.2d at 240-41, 943 P.2d 494.

ISSUES

At the prehearing conference, the parties agreed that the issues on appeal are as follows:

A. Whether the Kansas Act and the KCC orders implementing that Act violate or are inconsistent with the Federal Act because the concept of revenue neutrality required by the Kansas Act, K.S.A.1996 Supp. 66-2005(c) and 66-2008(a), is inconsistent with and/or preempted by § 254(b)(4), (b)(5), (f), (i), or (k) of the Federal Act.

B. Whether the Kansas Act and the KCC orders implementing that Act violate or are inconsistent with the Federal Act because the prohibition against audits and earnings review found in the Kansas Act, K.S.A.1996 Supp. 66-2005(u), is inconsistent with and/or preempted by § 254(b)(4), (b)(5), (f), (i), or (k) of the Federal Act.

C. Whether the concept of revenue neutrality and the prohibition against audits and earnings review prevent the KCC from performing its regulatory responsibilities in general, K.S.A. 66-1,187 et seq., and/or are *695 inconsistent with other provisions of the Kansas Act, such as the public policy of Kansas expressed in K.S.A.1996 Supp. 66-2001.

D. Whether CMT et al., wireless service providers, were given proper notice of the proceedings and a reasonable opportunity to prepare for the hearings before the KCC.

E. Notwithstanding the provisions of K.S.A.1996 Supp. 66-2008(b), whether K.S.A. 66-1,143(b) prevents the KCC from requiring wireless service providers to contribute to the KUSF.

F. Whether the Court of Appeals' decision has an unforeseen, adverse effect on rural ILECs, in light of the mandated reductions in ILEC intrastate access rates effective March 1, 1997, such that the Court of Appeals' decision should be reversed.

G. Whether the legislature's authorization to the KCC to determine the appropriate level of funding contribution and regulation of the KUSF pursuant to K.S.A.1996 Supp. 66-2008 is an unconstitutional delegation of legislative power to an administrative agency.

H. Whether the KCC orders are in conformity with the Kansas Act, (1) as the initial size of the KUSF

fails to comply with the mandate of K.S.A.1996 Supp. 66-2008 and (2) the KCC orders improperly exempt LECs from contributing to the KUSF in violation of K.S.A.1996 Supp. 66-2008(b).

Pursuant to the Kansas Act, K.S.A.1996 Supp. 66-2005(c), the KCC ordered LECs to reduce intrastate access and toll rates for long distance services to interstate levels over a 3-year period. ("[A]ll local exchange carriers shall reduce intrastate access charges to interstate levels.... Rates for intrastate switched access, and the imputed access portion of toll, shall be reduced over a three-year period for SWBT and United with the objective of equalizing interstate and intrastate rates in a revenue neutral ... manner.") This reduction would result in a loss of revenue to LECs. To make up for this lost revenue, LECs are allowed to recover revenue they otherwise will have lost as a result of the ordered access and toll reductions.

In general, "revenue neutrality" refers to equalizing interstate and intrastate rates for long distance service while at the same time making up the lost revenues resulting from the ordered intrastate rate reductions through payouts from the KUSF, by an increase in pay telephone call rates, and by charges for all directory assistance calls. The idea is to equalize interstate and intrastate rates for long distance service by forcing intrastate rates down and then offset the resulting loss of LEC revenue by substituting from other sources an amount equal to the amount lost.

All companies providing intrastate telecommunications services are required to contribute to the KUSF on an equitable and nondiscriminatory basis. Any provider which contributes to the KUSF may collect from customers an amount equal to such provider's contributions. K.S.A.1996 Supp. 66-2008(b).

At the heart of its decision, the Court of Appeals held that the concept of revenue neutrality, K.S.A.1996 Supp. 66-2008(a) and 66-2005(c), and the prohibition against audits and earnings review, K.S.A.1996 Supp. 66-2005(u), both of which underlay the KCC orders, are inconsistent with § 254(b), (f), (i), and (k) of the Federal Act:

"(b) UNIVERSAL SERVICE PRINCIPLES. The Joint Board and the Commission shall base policies for the preservation and advancement of universal

service on the following principles:

....
 (4) **EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS.** All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.
 (5) **SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS.** There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

....
 "(f) **STATE AUTHORITY.** A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance *696 universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

....
 "(i) **CONSUMER PROTECTION.** The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

....
 "(k) **SUBSIDY OF COMPETITIVE SERVICES PROHIBITED.** A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services."

Because of the holding that the revenue neutral concept and the no audit provision of the Kansas Act are inconsistent with the Federal Act, the Court of

Appeals determined the KCC orders, which implement and follow the revenue neutral concept and the no audit provision, are likewise inconsistent with the Federal Act and must be set aside. 24 Kan.App.2d at 240-41, 943 P.2d 494.

Further, according to the Court of Appeals, the concept of revenue neutrality and the prohibition against audits prevents the KCC from performing its regulatory responsibilities in general, and the concepts are inconsistent with the obligation of the KCC to ensure just and reasonable rates and charges for the consumers of Kansas. 24 Kan.App.2d at 240-41, 943 P.2d 494.

The Court of Appeals noted the purpose of the KUSF is to ensure that all Kansans have access to universal service at affordable rates but stated it is impossible for the KCC to determine an affordable rate for universal service without being able to perform an audit or earnings review of incumbent LECs. The Court of Appeals further noted the record on appeal does not disclose the cost of basic telephone service in Kansas or the cost to provide universal service. It stated the funding level of the KUSF was preordained by the legislature at \$111.6 million (the amount equal to the revenues lost from the intrastate access and toll reductions) but that this funding level bears no rational relation to the concept of universal service and its cost. It commented that the funding methodology protects incumbent LECs by shifting lost revenues from one corporate pocket to another while requiring all other providers and consumers to bear the financial burden of revenue neutral regulation. It faulted the funding methodology for the KUSF as precluding meaningful review of whether LECs are using services that are not competitive to subsidize services that are subject to competition. 24 Kan.App.2d at 238, 943 P.2d 494.

The Court of Appeals ordered that, upon remand, the KCC must comply with § 254(f), (i), and (k) of the Federal Act in establishing local rates and in funding the KUSF. As to compliance of the KCC orders with the Kansas Act, the Court of Appeals concluded that most of the issues raised in this regard were rendered moot by its decision reversing the KCC orders. However, it indicated that upon remand the KCC must establish contributions to the KUSF by individual entities on an equitable and nondiscriminatory basis, as required by K.S.A.1996

Supp. 66-2008(b), but said that this equitable and nondiscriminatory standard cannot be met without a thorough analysis of cost information by the KCC. 24 Kan.App.2d at 239, 943 P.2d 494.

Finally, the Court of Appeals held the KCC orders concerning the methodology to be used to determine payouts from the KUSF to LECs is inconsistent with § 254(k) *697 of the Federal Act, which directs that the states should establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services. In this regard, the Court of Appeals stated that the KCC orders unduly burden the basic local service consumer with loop costs that are attributable to other services because the amount of support to be paid LECs from the KUSF is based upon allocating 100% of the loop costs to basic local service but actually only about 75% of the cost of basic residential service is the cost of the local loop. 24 Kan.App.2d at 240, 943 P.2d 494.

The Court of Appeals then invalidated the KCC final orders and remanded for further proceedings, with directions to the KCC to disregard the concept of revenue neutrality and the no audit or earnings review provision of the Kansas Act as they are inconsistent with the Federal Act and the public policy of Kansas as expressed in K.S.A.1996 Supp. 66-2001. It also set aside the KCC's decision to allow an increase in pay phone and directory assistance rates on grounds that decision was part and parcel of the KUSF funding decision which the court invalidated. 24 Kan.App.2d at 240-41, 943 P.2d 494.

With regard to the first three issues on appeal, the Court of Appeals determined the revenue neutral and no audit provisions of the Kansas Act (1) are inconsistent with § 254(b)(4), (b)(5), (f), and (i) of the Federal Act; (2) prevent the KCC from ensuring compliance with § 254(k) of the Federal Act, i.e., from ensuring that carriers do not use services that are not competitive to subsidize services that are subject to competition; (3) prevent the KCC from performing its regulatory responsibilities in general and ensuring just and reasonable rates and charges for the consumers of Kansas; and (4) make it impossible for the KCC to determine an affordable

rate for universal service. The Court of Appeals found fault with the KCC orders apparently because (1) they are based on and follow the revenue neutral and no audit provisions of the Kansas Act; (2) due to the requirement of revenue neutrality, the funding level of the KUSF established by the orders has no rational relation to the concept of universal service and its cost; (3) the funding methodology for the KUSF precludes meaningful review of whether LECs are using services that are not competitive to subsidize services that are subject to competition; (4) the funding methodology possibly might not result in contributions on an equitable and nondiscriminatory basis; (5) the orders are not based on a thorough analysis of cost information which makes it impossible to determine whether contributions to the KUSF are on an equitable and nondiscriminatory basis; and (6) the payout methodology is inconsistent with § 254(k) of the Federal Act.

A. REVENUE NEUTRALITY

K.S.A.1996 Supp. 66-2005(c) provides:

"(c) Subject to the commission's approval, all local exchange carriers shall reduce intrastate access charges to interstate levels as provided herein. Rates for intrastate switched access, and the imputed access portion of toll, shall be reduced over a three-year period with the objective of equalizing interstate and intrastate rates in a revenue neutral, specific and predictable manner. The commission is authorized to rebalance local residential and business service rates to offset the intrastate access and toll charge reductions. Any remaining portion of the reduction in access and toll charges not recovered through local residential and business service rates shall be paid out from the KUSF pursuant to K.S.A.1996 Supp. 66-2008. Rural telephone companies shall reduce their intrastate switched access rates to interstate levels on March 1, 1997, and every two years thereafter, as long as amounts equal to such reductions are recovered from the KUSF."

K.S.A.1996 Supp. 66-2008 provides in relevant part:

"On or before January 1, 1997, the commission shall establish the Kansas universal service fund, hereinafter referred to as the KUSF.

*698 "(a) The initial amount of the KUSF shall be comprised of local exchange carrier revenues lost